MOTION FILED
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No. 02-375

IN THE
Supreme Court of the United States

ROBERT BRUCE CRAFT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF GEORGIA

MOTION OF THE NATURIST ACTION COMMITTEE AND THE NATURIST EDUCATION FOUNDATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OUT OF TIME AND AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OUT OF TIME

Per Supreme Court Rule 21, Amici Curiae move this Court for permission to file a brief outside the applicable time period. Amici Curiae show that all parties consent to their filing a brief. Amici Curiae also show that, due to their nation-wide and geographically diverse constituency, they were able achieve the requisite signatures authorizing the brief only towards the end of the applicable time period. As encouraged in Supreme Court Rule 37, the below brief brings to the Court's attention relevant matter not already brought to its attention by the parties.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1] [2]

Naturism is a way of life in harmony with nature characterized by the practice of nudity, with the intention of encouraging body acceptance, self-respect, respect for others, and respect for the environment. Formed in 1980 and based in Wisconsin, The Naturist Society "is a world leader in promoting body acceptance through nude recreation." *http://www.naturistsociety.com* With more than 27,000 members world wide, "The Naturist Society is a staunch supporter of the right to social nudity in appropriate public and private areas." *http://www.naturistsociety.com* As its web site decries:

> This site contains nudity. Nude is not lewd! The Naturist Society believes the human body is natural, not shameful. If images of non-erotic, non-sexual nudity offend you, our site may not be for you.

http://www.naturistsociety.com

The Naturist Society functions through an activist core consisting of two nonprofit adjuncts: the Naturist Action Committee ("NAC") and the Naturist Education Foundation

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1. Pursuant to Supreme Court Rule 37.6, counsel for amici The Naturist Action Committee and the Naturist Educational Foundation states that she authored this entire brief. However, counsel additionally states that her fee was paid in its entirety by Dr. and Mrs. Geoff King, friends of the Defendant. Dr. and Mrs. King also funded the printing costs for this amicus. Amici curiae did not contribute any financial support to this brief.

("NEF"). NAC and NEF are overseen by board members who are democratically elected by and from the membership of The Naturist Society. NAC and NEF are the named amici.

NAC is a grass roots organization that relies on the involvement and participation of individual naturists and groups at local levels. Its mission: "To advance and protect the rights of naturists throughout North America. NAC supports the responsible recreational nude use of public lands." *http://www.nac.oshkosh.net* NEF is the nationwide informational and educational adjunct to The Naturist Society. NEF's mission is to improve public awareness of naturism in order to achieve greater understanding and acceptance.

NAC and NEF urge this Court to issue a writ of certiorari because they are concerned about attempts to criminalize naturism. Nudity alone, even nude depictions of children, does not place otherwise protected material outside the mantle of the First Amendment. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *see also New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982). This Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Georgia; without review, amici fear prosecution by law enforcement of their constitutionally protected speech.

SUMMARY OF ARGUMENT

This case impacts thousands of Americans who believe in naturism — indeed millions of Americans who post photographs of unclothed infants on their refrigerators. This Court should issue a writ of certiorari because inherent danger lies in the regulation of expression. As this Court has held, nudity alone is protected expression: to lose free speech

protection, there must be something more than mere nudity. NAC and NEF urge this Court to issue a writ of certiorari, so that naturists may exercise their beliefs safely, freely, and in accordance with prescribed guidelines.

ARGUMENT

A. *Naturism is a commonly held belief.*

> President John Quincy Adams was a regular skinny dipper. According to reports, "each morning he got up before dawn, walked across the White House lawn to the Potomac River, took off his clothes and swam in the nude. Then he returned to the White House to have breakfast, read the bible and run the country." President Theodore Roosevelt frequently swam nude in Rock Creek Park in Washington, once skinny-dipping with the French diplomat, Jules Jusserand. President Lyndon Johnson occasionally swam nude with guests in the white house pool, including evangelist Billy Graham. Senator Edward Kennedy has been photographed skinny dipping at public beaches in Florida. At the White House of his brother, John F. Kennedy, nudity had been common around the White House pool. Many U.S. congressmen enjoy nude recreation, albeit segregated: U.S. Senate members may use the Russell Senate Office Building Pool in the nude (the few female Senators make appointments to assure there won't be males on hand), and Representatives may use a clothing-optional steam room, where President Bush was said by Newsweek to hang out sans towel with his buddies. Congressmen also

> sunbathed nude on the Speaker's Porch until one day in 1973 when Representative Patricia Schroeder wandered into the gathering inadvertently.

Bacher, *205 Arguments and Observations In Support of Naturism*, 16.1 Nude & Natural 61 (Fall 1996). Who are today's naturists?

> You may know them as harmless skinny-dippers. That's true, but they also hold some deep and abiding philosophy. "Naturist" is the worldwide term for individuals and families who devote part of their time to being natural in the open expanse of nature, and who adhere to a strict code of conduct.

Levalley, *Naturists: Upholders of Strong Family Values* 1 (1997) (available from the Tallahassee Bare-Devils or The Naturist Society).

"Naturists are, and always have been, in the mainstream of American family tradition." *Id.* at 1.

> Naturists draw a firm line between nudity and sex. (After all, people are nude far more often for bathing than for sex. If nudity is associated with anything, it should be with cleanliness.) Naturists recognized sex as a healthy, joyous, and intimate part of life. But without intimacy, most of its value is lost, and therefore sex is inappropriate in any public place.

Id. at 5.

> In keeping with the way most naturists see themselves, the ads for nudists products avoid sexual

> innuendo and remain wholesome. Ads in mainstream publications like *USA Today*, *The Atlantic* and *Caribbean Travel & Life* push nudism as a family activity that lets executives and other busy people strip away the stress of corporate life along with its uniform.

Coleman and Rees, *Naked Appeal*, Forbes, Oct. 12, 1992, at 138.

> 'Naturism' was not a word current or used in North American before 1981. It since has been adopted by a number of clubs, groups and individuals with little and even no public nude recreation experience. Some traditional nudists suggest that there is no difference indicated by the words 'nudist' and 'naturist.'

Who Are the Naturists? 1.1 Clothed With the Sun[3] 5 (Summer 1981) *reprinted in* 9.1 Clothed With the Sun 22 (June 1989). "Naturism" is the term coined by serious nudists to denote "nudism." *See* Coleman and Rees, *Naked Appeal*, Forbes, Oct. 12, 1992, at 138.

1. ***There are a significant number of naturists in this country.***

> Politically, nudists divide into two camps. Conservatives tend to join the Florida-based Sunbathing Association [now known as the

3. *Clothed With the Sun* was the name for *Nude & Natural*, the quarterly publication of the Naturist Foundation, during the years 1980-1989. The magazine is "the leading publication on naturism in the United States and the authority on social responsible and adventurous nudity." http://www.naturistsociety.com/magazine

> American Association for Nude Recreation "AANR"] . . . they usually want to be left alone, so they gravitate toward the 200 or so private clubs around the country. Liberals are more likely to join the outspoken . . . Naturist Society and to use public beaches.

Overby and Kempner, *The Right to Undress*, 17 Common Cause Magazine 6 (Jan./Feb. 1991).

Today, membership in the Naturist Society, founded in 1980 and the umbrella parental group of amici curiae, is over 27,000. *http://www.naturistsociety.com* Membership in the American Association for Nude Recreation, founded in 1931 and formerly known as the American Sunbathing Association, is approximately 50,000. *http://www.aanr.com* Often, members overlap in both groups. In 1992, "[i]ncluding cruises, resorts and sundry merchandise — videos, coffee mugs and the occasional T shirt for those nippy days — nudism [wa]s bringing in revenues of about $120 million a year." Coleman and Rees, *Naked Appeal*, Forbes, Oct. 12, 1992, at 138.

In sum, without guidance from this Court, thousands of individuals fear prosecution for posting photographs of their nude children throughout their homes. In fact, in its petition for certiorari from the Georgia Supreme Court, the State of Georgia traced "how visual depictions of nudity have been treated in terms of their susceptibility to criminal punishment in the last sixty years." State's Petition for A Writ of Certiorari to the Court of Appeals, at 5-8. Petitioner Craft, in his response to the State's Petition, noted "[t]he state's historical discussion hearkens back to the halcyon days when nudists could be prosecuted as felons." Response of Dr. David Bruce Craft to the State's Petition For Certiorari, at 8. This is the prosecution amici fear.

2. *The polls show growing support for naturism.*

Support for naturism in America is increasing. In fact, according to a study commissioned by the Trade Association for Nude Recreation, "participation in nudism is currently growing by about 20% per year." Coleman and Rees, *Naked Appeal*, Forbes, Oct. 12, 1992, at 138 *noted in* Bacher, *205 Arguments and Observations in Support of Naturism*, 16.1 Nude & Natural 61 (Fall 1996).

In 1983, an independent Gallup poll, commissioned by the Naturist Society, posted a seventy-two (72%) percent support rate for nude sunbathing in designated areas. Gallup Poll, *Clothed With the Sun*, 1983 (available from The Naturist Society). By 2000, support for nude sunbathing in designated areas, studied in an independent poll commissioned by the Naturist Education Foundation, had risen to eighty (80%) percent. Roper-Starch Poll, *American Attitudes on Skinny-dipping and Nude Sunbathing*, 2000 (available from the Naturist Education Foundation).

Similarly, the 1983 Gallup poll queried support for set asides of public land for nude sunbathing. Support rose from thirty-nine (39%) percent of those polled in 1983 to forty-eight (48%) percent of those polled in 2000. Gallup Poll, *Clothed With the Sun*, 1932 (available from The Naturist Society); Roper-Starch Poll, *American Attitudes on Skinny-dipping and Nude Sunbathing*, 2000 (available from the Naturist Education Foundation)

Finally, "[a] Martini & Rossi poll reveal[ed that] 35% of Americans would 'bare it all' on a nude beach."[4] Cable News

4. In 2001, thirty-four (34%) percent of the 18-34 age group was "willing to bare it all and visit a clothing-optional resort or nude beach [, more so] than their baby boomer counterparts age 45-54 (11%)." *More Americans Trying Nude Recreation*, 130 U.S.A. Today Magazine 6 (July 2001).

Network, Factoid, Apr. 24, 1990 *noted in* 10.1 Nude & Natural 5 (1990) *noted in* Bacher, *205 Arguments and Observations in Support of Naturism*, 16.1 Nude & Natural 61 (Fall 1996).

This growing body of Americans needs guidance on what expression is permissible, and what is not. For this reason, amici curiae respectfully urge this Court to grant a writ of certiorari in this case.

B. *Georgia's child pornography law may criminalize protected expression.*

Without prescribed guidelines, naturists are unsure what material of theirs' is criminal and what is not. This Court has held that "nudity without more is protected expression." *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982). However, what is more?

This Court has struggled with this question, in an effort to define the exact contours of child pornography, most particularly the definition of lewd exhibition of the genitals. Amy Adler, a leading academic on the subject and Associate Professor of Law at New York University School of Law, articulates the issue as follows. *See* Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 238 (2001).

> It is [the] term, "lewd" or "lascivious exhibition of the genitals," that has launched the most problematic aspect of defining child pornography. Determining whether a photo depicts a child engaged in intercourse or masturbation, for example, would appear to be a relatively straightforward task. But what exactly is "lascivious exhibition of the genitals?" How does

> it differ from an "innocuous" photograph of a naked child — a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model? It is at this margin of child pornography law, where its prohibitions bump up against "innocent" speech, that, ironically, the definition of child pornography has grown.

Id. at 238 cites omitted.

In the case at bar, the Court of Appeals of Georgia failed to acknowledge the considerable First Amendment implications of its decision in its opinion. For this reason, amici intervene herein. The Court should issue a writ of certiorari to guide amici curiae and others in the conduct of their lives. The Court of Appeals of Georgia failed to explain whether or not photographs taken by amici curiae of children participating in non-sexual nude recreation may subject them to prosecution as child pornographers.

C. ***Naturists fear prosecution.***

As they now stand, Georgia's child pornography laws very well may criminalize protected expression. Where "speech is neither obscene nor the product of sexual abuse, it does not fall outside the protections of the First Amendment." *John D. Ashcroft, Attorney General, et al. v. The Free Speech Coalition, et al.*, __ U.S. __, 122 S. Ct. 1389, 1402 *citing Ferber*, 458 U.S. at 764-65. This Court has explained:

> The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the

> government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'

Miller v. California, 413 U.S. 15, 34-35 (1973).

Nudity often may have serious literary, artistic, political, and or scientific value. Recently striking down the Child Pornography Prevent Act of 1996 (CPPA), this Court examined the standards of serious literary, artistic, political, and or scientific value. *See Ashcroft*, __ U.S. at __, 122 S. Ct. at 418. The Court decided that the CPPA would ban speech despite its serious literary, artistic, political or scientific value: "[a]ny depiction of sexually explicit activity, no matter how it is presented, is proscribed." *Id.* at 418. "The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse." *Id.* at 418.

By way of descriptive example, the Third Circuit Court of Appeals published a well-reasoned opinion concerning whether or not nude photographs constituted political speech. In *United States v. Various Articles of Merchandise, Schedule No. 287 (Alessandra's Smile, Inc.)*, a forfeiture case, the Third Circuit reversed an obscenity conviction, holding that seized magazines were not obscene, and ordered them returned to the defendant store. *United States of America v. Various Articles of Merchandise, Schedule No. 287*, 230 F.3d 649 (3d Cir. 2000). The seized materials included brightly colored photographs of nude children, teenagers, and adults playing or smiling and posing for the camera. *Id.* at 685. In determining that the magazines qualified for First Amendment protection because of their political value, the Third Circuit court observed,

> The term 'political' which we employ here is broad enough to encompass that which might tend to bring about 'political and social changes.' Nudists are members of an alternative community, and the magazines champion nudists' alternative lifestyle, which lifestyle the nudist community may fear is in danger of being curtailed by government regulation. It is true that the political value of these magazines is not as immediately evident as the political value of [another magazine], which contains articles about the legal status of public nudity around the world and actively advocates for unregulated nudism. This is so particularly since the text of the seized magazines is not before us. However, publications dedicated to presenting a visual depiction of an alternative lifestyle, a depiction with a decidedly Utopian flavor, have political value similar to the political value of articles criticizing government regulation of that and other lifestyles.

Id. at 658-59.

Relying repeatedly on *Miller*, the Supreme Court consistently has expressed concern that protected nude expression falls prey to the child pornography statutes. For example, in *Ferber*, the Court noted that the lower court "was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the *National Geographic* would fall prey to the statute." *Ferber*, 458 U.S. at 773.

Moreover, *Ferber's* progeny continued to struggle with the concept of the criminalization of protected speech.

In *Osborne v. Ohio*, Supreme Court observed, "one might imagine circumstances in which the statute by its terms, criminalizes constitutionally protected conduct. If for example a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply." 495 U.S. 103, 114 (1990).

Finally, in *Massachusetts v. Oaks*, dissenting Justice Brennan, joined by Justices Marshall and Stevens, wrote:

> [P]arents might want to photograph their infant children or toddlers in the bath or romping naked on the beach, yet [the statute] threatens them with a prison term of between 10 and 20 years of a minimum fine of $10,000 for doing so. And [the statute] imposes those penalties even though parents have the same First Amendment interest in taking those photographs as they do in keeping a diary or boasting of their children's antics, and even though their children would not thereby be harmed. **Amicus American Sunbathing Association, a nudist organization with 30,000 members in the United States and Canada, further notes that family photographs taken by its members would subject them to possible prosecution, notwithstanding the protected character of their activity and their denial of any intrinsic connection between public nudity and shame.**

Massachusetts v. Oaks, 491 U.S. 576, 592-93 (1989) (emphasis added).

Justice Brennan has described perfectly the position in which amici curiae find themselves. Therefore, amici urge

this Court to grant a writ of certiorari to contemplate, in addition to Defendant Craft, the situation of amici curiae and others. Amici fear possible prosecution if the Court of Appeals' order stands unreviewed and this Court declines to issue a writ.

CONCLUSION

As set forth above, this case impacts thousands of Americans who believe in naturism — indeed millions of Americans who post photographs of unclothed infants on their refrigerators. Naturism is a belief held by thousands of Americans, whose numbers are growing. This Court should issue a writ of certiorari to address specifically what nudity is protected expression. Naturists, thereby, will have the necessary guidance to exercise their beliefs safely, freely, and in accordance with prescribed guidelines.

Respectfully submitted,

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